

BEFORE THE PUBLIC UTILITIES COMMISSION OF STATE OF CALIFORNIA

Investigation on the Commission's own motion into the operations, practices, and conduct of Pacific Bell Wireless LLC dba Cingular Wireless, U-3060, U-4135 and U-4314, and related entities (collectively "Cingular") to determine whether Cingular has violated the laws, rules and regulations of this State in its sale of cellular telephone equipment and service and its collection of an Early Termination Fee and other penalties from consumers.

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PUBLIC UTILITIES COMMISSION
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**ORDER INSTITUTING INVESTIGATION INTO THE OPERATIONS OF
PACIFIC BELL WIRELESS AND RELATED ENTITIES, DBA CINGULAR**

I. SUMMARY

By this Order, the Commission institutes an Investigation into the practices of Pacific Bell Wireless, LLC, at times doing business as Cingular Wireless ("Cingular").

We take this action based in part on customer complaints that Cingular's system has inadequate coverage in customers' area of use, and insufficient system capacity to carry their calls as needed, contrary to the customers' reasonable expectations.

Cingular sells mobile telephones bundled with wireless and long-distance telephone services. In so doing, Cingular makes the implied promise that adequate system coverage and capacity will exist in the subscriber's area of use. This promise is then taken back -- in some of Cingular's marketing materials -- by a fine-print disclaimer of warranty. The limitations of Cingular's system often defeat the customer's reasonable expectations of coverage and capacity. The customer, however, may be prevented from canceling Cingular's service and returning the phones by virtue of a \$150 (or higher) early

termination fee (ETF) and other fees which make cancellation more costly than continuing to use the inadequate service. The Commission will investigate whether Cingular's sale of cellular telephone service and equipment, and its collection of the ETF and other penalties from consumers, violate the laws of this State or the orders and regulations of this Commission.

II. STAFF INVESTIGATION & FACTUAL ALLEGATIONS

A. Background

Cingular provides cellular or wireless communication services -- generally bundled with cellular or wireless handsets and other equipment -- to residential and business customers.

On September 28, 2001, the Legal and Consumer Services Divisions of the Commission sent a letter to Cingular, stating that the Commission had received over 3,117 complaints against Cingular since January 1, 2000, many of which stemmed from "dissatisfaction with Cingular's quality of service and assessment of an Early Termination Fees (ETF)" [sic]. The letter stated that failing to provide adequate service, misrepresenting service quality, and/or failing to provide "sufficient information to consumers to allow them to make informed choices among services and providers" violated Sections 451 and 2896 of the Public Utilities Code, and other California laws. The letter also "place[d] Cingular on notice that these practices must cease." The practices described in that letter appear to be continuing.

On April 29, 2002, the Commission received from Cingular a response to the September 28, 2001 "cease and desist" letter. In its letter, Cingular states that it is instituting a "15 day cancellation policy that permits a customer to cancel Cingular's service without incurring an early termination fee." Cingular also claims that it "does not misrepresent its coverage area," and that "the number of asserted customer complaints is taken out of context."

B. Complaints & Investigation

In 1999, the Commission's Consumer Affairs Branch ("CAB") received approximately 1,132 customer complaints concerning Cingular's marketing, service and/or billing. In 2000, the number of complaints rose to 1,228, and in 2001 the number of complaints almost doubled to 2,403. A substantial portion of these complaints concerned coverage or capacity problems and/or the ETF.

Staff has reviewed the complaints received by CAB and found that many of the complaint letters expressed frustration over limitations to the utility's coverage area and system capacity. Customers found they did not have coverage where they lived, worked or commuted, or that their calls were routinely dropped. Many stated that limitations in system coverage or capacity were not disclosed to them.¹ Many were angry at Cingular's unwillingness to provide a refund or cancellation without charging the ETF and, in some instances, the full sale price of the phones and other fees as well, even when the customer was willing to return the phone. Customers felt trapped into inadequate service with Cingular.

Newspaper articles have reported consumer dissatisfaction with wireless telephone service coverage,² and Internet websites have become a forum for customer complaints about Cingular in particular, where thousands of Cingular customers have signed petitions evincing their dissatisfaction with Cingular's services.³

Staff interviewed some of the complainants, and a number of the interviewees have executed declarations attesting to the problems they have had with Cingular's marketing, service and billing.⁴ These declarations, along with Staff's Report,

¹See Staff Report, at footnotes 7-16 and accompanying text.

²See, e.g., "Dead Zones Where Cell Phones Don't Work, Companies own data show wide gaps in coverage in Bay Area," *San Francisco Chronicle*, April 1, 2001, at p. 1 (reporting *inter alia* on San Francisco PBW/Cingular customer unable to obtain steady coverage in his San Francisco neighborhood).

³Staff Report, at 4-5 (websites critical of Cingular) and Attachment G (online petition).

⁴See Declarations of Lara Buchanan, Karen Busse, Mohamad Dashitzad, Anne Grillot, Donna Halow, Joe/Katherine Ramsey, Mac Rogers, Larry Scott, Colin Smith, Ronald Smith, Afshin Sooferian, Suzanne Strache, Katy Summarland, and Christine Waiton, and complaint letters of Lisa Gaines, Jeanne Loveless,

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are released today and shall be placed in the Commission's public formal file for this proceeding.

C. Advertising & Sales – Inadequate Disclosure of Coverage/Capacity Limitations.

Staff also propounded data requests to Cingular. Based on Cingular's responses, and its own further investigation, Staff reports that Cingular markets its telecommunications products to residential and small business customers throughout California. Cingular sells the telephone equipment and wireless service as a bundled unit through a series of exclusive agents, exclusive dealers, and non-exclusive dealers (including national chains such as Sears, Costco, Staples, Circuit City, and the Good Guys).

Part of Cingular's marketing campaign consists of widespread and frequent newspaper and radio advertisements in California. A recent radio advertisement, for example, claimed that Robinson Crusoe would not have had to spend so long on his desert island had he been provided with a Cingular wireless phone. Before the Cingular name was used, advertisements used the Pacific Bell Wireless (PBW) name. PBW advertisements referred to "our California/Nevada network," "unlimited domestic long distance," a "national rate plan," and the ability "to call nationwide at any time." On some of these advertisements, there is a fine print disclaimer that "coverage limitations apply." Advertisements bearing Cingular's name and logo contain similar representations and disclaimers: large print references to the "Cingular Nation," "unlimited nationwide long distance" and a network stretching "across the state or across the country," coupled with fine print disclaimers that "Cingular does not guarantee uninterrupted service coverage"⁵

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and Rosa Quigley, found as Attachment C to Staff Report.

⁵For example, an advertisement published on March 21, 2002 in the *San Francisco Chronicle* touted the "Cingular Nation plans" with a headline "Never pay long distance or roaming again." The only language disclosing limited coverage is this fine print disclaimer: "Cingular does not guarantee uninterrupted service coverage." There is no reference to coverage maps found elsewhere.

or "Cingular does not guarantee access to any site not on the Cingular provided www.mywirelesswindow.com deck." ⁶

At some point, perhaps in mid-2000, PBW began posting coverage maps on the Internet, showing general coverage throughout the Bay Area and Los Angeles, with small-print disclosures at the bottom of the maps related to limitations in coverage area.⁷ Coverage maps now appear to be located at www.cingular.com, although these remain confusing and constantly changing.⁸ This website address is contained on some but not all of Cingular's recent print advertising.

Most immediately available to customers are the coverage maps found in brochures at agent and dealer locations. In a September 28, 2001 data request, CSD asked Cingular to "Provide copies of all promotional materials and sales scripts used to sell Cingular Wireless' telecommunications services. " Cingular produced some brochures, which together with brochures acquired during 2001 site visits, are found as Attachment A to the Staff Report. These tend to show unbroken coverage in the large California metropolitan areas, if not across the entire State. These are accompanied by small-print disclosures that range (in the PBW, pre-Cingular era) from "This map is an approximation. Actual coverage may vary due to terrain, customer equipment, digital network availability and atmospheric conditions" (CCA 0752) to fuller disclosures in the brochures with Cingular's name on them. Staff Report at 10-11.

Cingular failed, however, to produce other brochures that had no such disclosures (Attachment A, Bates no. 00001), or disclosures buried in dark grey background (*id.* at 00014). These brochures were provided to the Commission by disgruntled customers. See, s.g., Busse Declaration and brochure, Attachment C to Staff Report. We are concerned with what appears to be a selective production of documents

⁶December 29, 2001 and January 2, 2002 visits to www.mywirelesswindow.com revealed that the coverage maps had been removed, and that there was only a listing of cities, including San Francisco and Los Angeles.

⁷Staff Report at 14-15.

⁸Staff Report at 7-8, 14-15.

by Cingular, and whether such production reflects a lax attitude by the utility concerning its obligations under Rule 1 of this Commission's Rules of Practice and Procedure.

Staff reports that the brochures and print advertisements reviewed also failed to contain any clear disclosure of limits on *system capacity* (as opposed to coverage area) -- a point clearly material to the numerous customers who have complained about "system busy" signals, particularly during "free nights & weekends."⁹

As this Order Instituting Investigation was being prepared, Cingular announced that it plans to spend almost \$1 billion upgrading its network in California and other Western states to increase system capacity and expand its coverage area.¹⁰

D. Contracts

Cingular has provided to Staff sample contract forms, some bearing the name and logo of Pacific Bell Wireless, some of Cingular. The contracts appear to have contemplated, at various times, the incorporation of several different documents, including but not limited to: the Wireless Service & Equipment Agreement ("WSEA"); a "Summary of Terms and Conditions"; 1-2 pages of "Service Highlights"; and a "Terms and Conditions Booklet." A selection of these documents is in Attachment D to the Staff Report; further contract documents are appended to the Declarations in Attachment C to the Staff Report.

Neither the execution pages of the PBW and Cingular contracts, the Service Highlights, or the Summary of Terms and Conditions appear to contain any disclosure of coverage or system limitations; disclosure of those limitations is found in the fine print of the terms and conditions booklets.¹¹ It is unclear whether such limitations are brought to

⁹See, for example, brochures in Attachment A; compare Attachment G (apparent customer complaints on Internet petition, many alleging "system busy" problem).

¹⁰"Cingular hopes to cut complaints – Wireless firm budgets nearly \$1 billion in upgrades for West," *San Francisco Chronicle*, April 2, 2002, page B-1 (noting that wireless carriers AT&T and Verizon plan on spending similar sums).

¹¹ ***Pacific Bell Wireless:***

The PBW agreement (WSEA) has blanks for "Service Commitment" (1 year, 2 year, etc.), followed by a

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smaller-print line stating "Early termination Fee of \$150 per Phone Number Applies." There is no disclosure on the WSEA of coverage limitations or a "no return" policy. By signing the agreement, the customer authorizes Cingular (here PBW) to provide "PCS service according to PBW's terms and conditions of Service [sic] and the Charges and Fees described herein." This sentence is in fine print at the bottom of the contract.

On the backside of the WSEA is the "Summary of Terms and Conditions," which refers to a separate "Terms and Conditions Booklet." All of the language on the "Summary" is in small or fine print, except for waivers of judge, jury, and class action rights. Under the heading for Service Commitment there is no disclosure or limitation regarding coverage; under the heading for Liability, the "Summary" states that "PBW does not assume any duty to provide uninterrupted service to you." Uninterrupted service is not more closely defined.

The page labeled Service Highlights likewise has no disclosure of limitations to coverage area or system capacity. Instead, under the heading of "Home Coverage Area and Roaming," it merely states that "Pacific Bell Wireless is licensed to provide service in California and Nevada." The Service Highlights page does contain a statement of PBW's "No Returns" policy:

Pacific Bell Wireless does not extend cash refunds or credit for returned phones or other equipment. There is no "cooling off" period. Please check with the retailer regarding its own policy for returns of wireless equipment.

The Pacific Bell Wireless Terms and Conditions booklet, under a section titled "CREDIT FOR SERVICE INTERRUPTION," allows that "quality of transmission may be diminished and calls ... may be dropped or may not be completed," but allows credit "for 1/30th of your monthly Service fee" only "if and when Service is rendered unusable for 24 consecutive hours."

Cingular:

The contracts bearing the name Cingular are generally similar to those described above, containing on the face of the contract no disclosure of limitations on coverage area or system capacity, or any disclosure concerning the no return policy.

The first text page of Cingular's terms and conditions booklet, in a section entitled "Availability of Limited Service" stresses the positive: "Service is generally available to wireless telephones equipped for the area when within the range of cell sites located in the service area." CCA 6751. There is no elaboration about the referenced "range of cell sites" or "service area." This sentence is also repeated on what appears to be the back of Cingular's "Wireless Service Agreement."

At page two, and in small print, the Cingular terms and conditions booklet also contains (at CCA 6752) this paragraph:

SERVICE INTERRUPTION Service may be temporarily interrupted, delayed or otherwise limited for a variety of reasons, including but not limited to, transmission limitations caused by atmospheric and other conditions, availability of radio frequency channels, system capacity limitations, coordination with other systems, equipment modifications and repairs, and problems associated with the facilities of interconnecting areas. There are gaps in Service within the service areas shown on coverage maps. CINGULAR does not guarantee you uninterrupted service. Airtime and other service charges apply to all calls, including involuntarily terminated calls.

the customer's attention, or whether, how and when the terms and conditions booklet is actually provided to customers. Cingular's "no return" policy (see preceding footnote) is not found on the execution page of the contract or the terms and conditions booklet, but only in the "Service Highlights."

As this Order was being prepared, Cingular began advertising (apparently in Northern California only) a "No Contract, No Commitment" plan which – notwithstanding the name – required the customer to sign a contract for services, but with the ETF eliminated in favor of a cash payment for the phone.¹²

E. Site Visits

Customer Declarations, and the reports of site visits by Commission staff appended to staff's report, reveal that actual representations by Cingular's sales agents and dealers vary widely from store to store. Most sales personnel either asserted that coverage was "good," "fine," that there were "no problems" with coverage or capacity, or that any problems were minimal and would be rectified by Cingular on notice from the customer. At no time did sales personnel draw the customer's attention to any limitation of coverage in the terms and conditions booklet. Notwithstanding Cingular's stated "no return" policy (see above), actual return policies appear to vary by store, with some sales personnel allowing (reactively, on inquiry) return periods from 30 minutes to several days, while others insisted that Cingular prohibited any return of equipment. See Appendix A to Staff Report, containing reports of the site visits.

F. Respondents

Pacific Bell Wireless, LLC, a Nevada corporation, currently does business as Cingular Wireless, and has its principal place of business in Atlanta, Georgia.

In D.94-10-031 (see below), the Commission required wireless utilities to file a Wireless Identification Registration with the Commission. On November 2, 2000,

¹²See Staff Report at 13 (noting that the disappointed customer's liability under this plan is for the full retail price of a phone usable only on the Cingular system, rather than the ETF as earlier).

Cingular (i.e., PBW dba Cingular) made a wireless registration filing pursuant to D.94-10-031. The Commission subsequently gave Cingular a corporate identification number of U-4314, allowing Cingular to "begin to resell wireless service to the public in California."

Cingular's predecessor Pacific Bell Mobile Services obtained U-4135 in November, 1994, and U-3060 in or about December 1995. U-3060 is significant, in that it is a carrier's (as opposed to a reseller's) U-number. It was apparently transferred to PBW in 1999.

The effective owner of Cingular/PBW appears to be an entity known as Cingular Wireless Communications LLC, which is a Delaware Corporation and which Cingular reports is owned 60% by SBC Communications Inc. and 40% by Southwestern Bell. Cingular has reported that PBW

is one of the wireless properties that SBC contributed to the joint venture [Cingular Wireless Communications LLC] and it operates the wireless licenses held by Pacific Telesis Mobile Services, a property of SBC Communications that was also contributed to the joint venture. PBW is the successor in interest to Pacific Bell Mobile Services, a California corporation.¹³

PBW/Cingular has reported to the Commission that "Since January 2000, PBW has done business as 'Cingular Wireless'." Staff's investigation, however, indicates that as late as December, 2000, PBW was still operating under its own name.¹⁴

Staff has discovered that Cingular also currently appears to be marketing its wireless services in conjunction with Earth One Network, Inc., dba Pac Plus Mobile Communications. This product is sold as Pac Plus, and the marketing materials feature the name "Cingular Wireless" in large print, with the contract containing the Pacific Bell Wireless logo and the promise that calls will be carried by "Pacific Bell Wireless"

¹³Cingular's 10/26/01 response to CSD data request no. 2, Attachment E to Staff Report.

¹⁴See, e.g., Busse Declaration and attached contract, Attachment C to Staff Report.

('PBW's') facilities." Staff Report at 11, Attachment F. The Pac Plus product appears substantially similar to the Cingular product in most respects, although Pac Plus has a somewhat different rate structure and an early termination fee of \$200 instead of \$150.

Because of the multiplicity and possible confusion of corporate names and products, as well as the preliminary nature of the investigation to date, we grant Staff leave to propose the addition of affiliated parties, factual allegations, or legal theories.

III. DISCUSSION

1. Commission Jurisdiction Over Wireless Telephone Providers.

Wireless carriers are "telephone corporations" and therefore public utilities under PU Code § 216, 233 and 234.¹⁵ See, e.g., D.01-07-030, Appendix A, *Interim Rules Governing Non-Communications-Related Charges on Telephone Bills*, at 1, 6. At all times, this Commission has asserted its jurisdiction to protect consumers of wireless/cellular telephone services:

Finally, we reiterate that our primary focus in the regulation of the cellular industry is the provision of good service, reasonable rates, and customer convenience.

D.89-07-019, *Re Regulation of Cellular Radiotelephone Utilities*, 32 CPUC 2d 271, 281; see also D.01-07-030, *supra*; D.96-12-071, *Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications*, 70 CPUC 2d 61, 72-73 ("we still remain concerned that the terms and conditions of service offered by each CMRS provider continue to provide adequate protection to consumers"¹⁶).

¹⁵Public Utilities Code § 216 defines "public utility" to include "telephone corporation"; § 234 defines "telephone corporation" to include any corporation controlling, operating, or managing a "telephone line" for compensation; and § 233 defines "telephone line" to include any "fixtures" or "personal property" operated or managed "in connection with or to facilitate communication by telephone, whether such communication is had with or without the use of transmission wires."

¹⁶CMRS refers to Commercial Mobile Radio Service, and includes Cellular Services, Personal Communications Services (PCS), Wide-Area Specialized Mobile Radio Services (SMR), and Radio/Telephone Utilities (RTU or paging) services. D.96-12-071, *supra*, 70 CPUC 2d 61, 65. The terms "CMRS" and "wireless" are commonly used interchangeably with "cellular," although Commission decisions refer to a distinction between "cellular" and "non-cellular" CMRS providers. See e.g., D.94-

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Before 1993, the Commission had plenary jurisdiction over wireless or CMRS carriers.¹⁷ In 1993, Congress passed the Omnibus Budget Reconciliation Act of 1993 (Budget Act), which amended Section 332(c)(3)(A) of the Communication Act as follows:

. . . no state or local government shall have any authority to regulate the entries of or the rates charged by any Commercial Mobile Service or any Private Mobile Service, except this paragraph *shall not prohibit a state from regulating the other terms and conditions of Commercial Mobile Service.*¹⁸

Shortly after passage of the Budget Act, the Commission instituted an investigation of the cellular industry in order "to develop a comprehensive regulatory framework consistent with the Federal Budget Act and our own statutory responsibilities." I.93-12-007, *Investigation on the Commission's Own Motion into Mobile Telephone Service and Wireless Communications*, 1993 Cal. PUC LEXIS 836. A

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12-042, I.93-12-007, *supra*, 58 CPUC 2d 111, 113, 114.

¹⁷D.89-07-019, *supra*; D.90-06-025, *Re Regulation of Cellular Radiotelephone Utilities*, 36 CPUC 2d 464, 470 (adopting "regulatory protections sufficient to control the potential harmful effects of the duopoly market structure," as well as limits on rate increases so that "carriers [will] expand their systems as rapidly as possible and price low enough to fill that capacity").

¹⁸Codified at 47 USC § 332(c)(3)(A) (emphasis added). The legislative history of this provision of the Communications Act indicates what Congress meant by the language "other terms and conditions":

It is the intent of the Committee that the State still will be able to regulate the terms and conditions of these services [CMRS]. By "terms and conditions" the Committee intends to include such matters as customer billing information and packaging and billing disputes and other such consumer protection matters; facility siting issues (e.g. zoning); transfers of control; bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis and such other matters as fall within the State's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."

House Report No. 103-111, at 251. The FCC has also confirmed the CPUC's jurisdiction over "other terms and conditions" when it stated that it anticipated that the CPUC would continue to conduct appropriate complaint proceedings and to monitor the structure, conduct, and performance of CMRS providers. See May 19, 1995 FCC Order Denying the CPUC's petition to continue to regulate CMRS rates.

year later the Commission adopted "interim procedures" (including a registration requirement for cellular carriers) to ensure that the Commission retained

the ability to provide a forum for the resolution of consumer problems when they may arise and continued regulation of other terms and conditions for all CMRS carriers.

D.94-10-031, in I.98-12-007, *supra*, 56 CPUC 2d 578, 579. In a 1996 decision, the Commission reiterated its intent to exercise its jurisdiction over "other terms and conditions" of cellular carriage:

Given the dynamic and changing nature of the CMRS market, we cannot anticipate all possible consumer issues or industry concerns that may arise over time, and the resulting scope of "terms and conditions" which we will actively supervise.

D. 96-12-070, *supra*, 70 CPUC 2d at 77 (Finding of Fact No. 21.)

The Commission has also asserted jurisdiction over the general "terms and conditions" by which bundled products are sold, i.e., wireless service when it is sold bundled with equipment. Early decisions in I.88-10-040, *Re Regulation of Cellular Radiotelephone Utilities*, prohibited bundling as disguised rate discrimination and as unfair to cellular equipment resellers not affiliated with the big carriers. See, e.g., D.89-07-019, *supra*, 32 CPUC 2d at 282; D.90-06-025, *supra*, 36 CPUC 2d at 517.¹⁹ In 1995, in the same docket, the Commission reversed course and declared that bundling was acceptable *as long as* cellular service

[p]roviders conform to all applicable California and federal consumer protection and below-cost pricing laws.

D.95-04-028, Ordering paragraph 1(5), 59 CPUC 2d 192, 214. Any sale of bundled wireless service and equipment that violated applicable consumer protection laws would thus violate the Commission's order in D.95-04-028.

¹⁹A later Commission decision suggests that D.90-06-025 permitted cellular carriers to "bundle service with equipment price concessions," but there is no such language in the prior decision. Compare D.95-04-028, 59 CPUC 2d at 197.

B. Analysis

Staff's Report and accompanying declarations raise serious issues. They describe a system that appears fundamentally unfair to consumers. Consumers leave a retail outlet bearing all the risk as to whether the just-purchased service and equipment will actually work in their homes and businesses and on their commute routes. To what extent this risk is ameliorated by Cingular's proposed new 15-day cancellation policy is an issue that this Investigation should consider. To date, the risk does not appear to be adequately disclosed to consumers.

There is a natural imbalance in the knowledge available to Cingular on the one hand, and the knowledge available to the average consumer on the other hand. Cingular presumably has fairly precise information relating to its coverage area, the percent of calls which are terminated or "dropped-off" the system, and those calls that do not go through because of busy circuits or other system capacity issues. The utility needs this information to site its cellular/PCS antennae, among other things. The consumer also needs this information, in a form intelligible enough to allow her or him to make informed market choices. The availability of such information is crucial to the healthy functioning of the telecommunications marketplace.

Without this information, the customer cannot knowingly accept the ramifications of an ETF or a "no returns" policy. There does not appear to be any point in the chain of Cingular's advertising, marketing and sales that the limitations to coverage and capacity are clearly and conspicuously disclosed. Nor does there appear to be any point where the limitations to coverage area and system capacity are brought into proximity to, or context with, the provisions for an ETF, the historical "no return" policy, or other penalties for early contract termination.

Some of the issues raised by the conduct described in this OII may be addressed on a prospective basis in the pending customer protection rulemaking, R.00-02-004. Of course, neither this nor Cingular's new 15 day cancellation policy implicate the disposition of issues in this case, which arise from past behavior.

If proven, the practices reported to us by Staff could indicate that Cingular has operated in disregard of statutes, rules, regulations, and other laws applicable to telephone utilities in California, and to businesses generally, and that this pattern of conduct is adverse to the public interest. The Commission has a duty to protect the public from unfair, deceptive, or illegal activities by utilities, and a concomitant interest in protecting the integrity and vitality of the marketplace.

In particular, it appears that Cingular may have violated the following California statutes and orders of this Commission:

- * P.U. Code § 451 by providing service in a way that was not "just and reasonable," by failing to disclose material facts to consumers, and by selling its products in violation of other laws and standards for fairness (see below);
- * D.95-04-028, Ordering paragraph 1(5), which requires the sale of bundled wireless service and equipment to comply with all California (and Federal) consumer protection laws, which may include but are not limited to the following:
 - (a) The Song-Beverly Consumer Warranty Act (Civil Code §§ 1792-1792.4), which provides that a vendor cannot disclaim the implied warranty of merchantability or, where applicable, the implied warranty of fitness of goods sold unless a conspicuous writing is attached to the goods which clearly informs the buyer, prior to the sale, in simple and concise language of each of the following:
 - (1) The goods are being sold on an "as is" or "with all faults" basis; and
 - (2) The entire risk as to the quality and performance of the goods is with the buyer.

In the case of Cingular's sale of equipment and goods, the entire risk as to the quality and performance of the bundled goods and services was on the buyer, but there was no conspicuous warning of that fact;

- (b) The Consumer Legal Remedies Act (Civil Code § 1770), which defines as illegal any sale of goods or services accompanied by the following conduct:

- (5) Representing that goods or services have characteristics uses, benefits, or quantities which they do not have
- (9) Advertising goods or services with intent not to sell them as advertised;
- (10) Advertising goods or services with intent not to supply reasonably expectable demand, unless the advertisement discloses a limitation of quantity ...
- (14) Representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law and
- (19) Inserting an unconscionable provision in a contract.

Cingular's advertisements, marketing materials, and websites -- as well as oral representations made by individual sales agents for Cingular -- have represented at various times that coverage is complete and unbroken in all designated coverage areas, when this appears not to be the case. The non-returnability of wireless equipment and the imposition of the ETF, in conjunction with the only partially disclosed limitations to system coverage and capacity, may be unconscionable in that the wireless equipment and service contracts appear to be contracts of adhesion, and unexpectedly and unfairly allocate the risks of the bargain;²⁰ and

- (c) the standards developed under California's Unfair Business Practices and False Advertising Statutes, Business & Professions Code §§ 17200 et seq. and 17500, et seq.; and

- * Public Utilities Code Section 2896, which requires telephone companies to supply their customers with all information necessary to make an informed choice between services

²⁰Staff also has noted that Cingular fails to post any signage advising that "Activation of any cellular telephone is not required and the advertised price of any cellular telephone is not contingent upon activation, acceptance, or denial of cellular service by any cellular provider," and thus may be in violation of California Business & Professions Code Section 17026.1(b). See Staff Report, at 16; compare D.97-02-053, *supra*, 71 CPUC 2d at 168ff.

Good cause appearing, therefore,

IT IS ORDERED that:

1. An Investigation on the Commission's own motion is instituted into the operations of Cingular, and all of its subsidiaries or affiliates responsible for the conduct described above (collectively, Respondents) to determine whether:

- (a) Respondents violated P.U. Code § 451 by failing to provide adequate, efficient, just, and reasonable service as necessary to promote the safety and convenience of its customers and the public;
- (b) Respondents violated P.U. Code § 451 by rules pertaining to its charges and service to the public, which rules are unjust and unreasonable, defeating the reasonable expectations of the consumer;
- (c) Respondents violated P.U. Code § 451 by failing to comply with standards (described in previous Commission decisions and in P.U. Code Section 2896 *inter alia*) that require all relevant, available, and accurate information be provided to customers so that they can make an intelligent choice between similar services where such a choice exists;
- (d) Respondents violated P.U. Code §§ 451 and 702 and Ordering Paragraph 5 of D.95-04-028 by marketing and selling bundled packages of services and goods in a way that was illegal, and therefore unjust and unreasonable, under the consumer protection laws of the State of California, including but not limited to the Song-Beverly Consumer Warranty Act (CC § § 1792-1792.4), the Consumer Legal Remedies Act (CC § 1770), and Sections 2314-2316 of the California Commercial Code;
- (e) Respondents violated P.U. Code §§ 451 and 702 and Ordering Paragraph 5 of D.95-04-028 by structuring their marketing and consumer contracts for bundled cellular service in ways that violate fundamental rules of honesty and fair dealing, prevent true competition in the consumer marketplace, and thus violate the standards developed under Section 17200 *et seq.* and 17500 *et seq.* of the California Business & Professions Code and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

- (f) Respondents violated P.U. Code § 2896 by failing to provide its customers with sufficient information upon which to make informed choices among wireless telecommunications services and providers, including but not limited to information regarding the provider's service options, pricing, and terms and conditions of service, and also by failing to provide reasonable statewide service quality standards.

2. In addition, the Investigation shall determine whether, pursuant to Sections 701, 734, and 1702 of the Public Utilities Code, institution of any or all of the following remedies are warranted:

- a. Respondents should be enjoined from collecting the ETF and other penalties for early termination unless Respondents receive a full, written acknowledgment from the consumer that Cingular's coverage area and system capacity are limited;
- b. Respondents should be required to conspicuously disclose, in all future advertising, marketing and contractual materials, limitations to their service coverage area and system capacity which may affect the service of some or all Californians;
- c. Respondents should be ordered to pay reparations pursuant to P.U. Code § 734, i.e., refund the EFT, plus interest, to all customers who paid such fee upon terminating their service after discovering that the service was inadequate;
- d. Respondents should be ordered to cease and desist from any unfair, unreasonable, unjust, deceptive, or unlawful operations and practices, and/or have conditions or restrictions imposed on their further operation in California; and whether
- e. Respondents should be fined pursuant to P.U. Code §§ 2107 and 2108 for the above-described violations of the Public Utility Code and related Orders, Decisions, Rules, directions, demands and requirements of this Commission.

3. To facilitate the completion of this investigation, and consistent with the provisions of P.U. Code § 314, respondents are ordered to preserve until further order by the Commission *all* documents, regardless of age, which might relate to this action, including but not limited to correspondence with consumers and third parties, inter-office memoranda, current and historical coverage maps and studies, studies and analyses of

system capacity, inter-office email, all websites and electronic archives of information from past company websites, consumer contracts, and complaints (i.e., all expressions of dissatisfaction) from California consumers.

4. Pacific Bell and its affiliates are ordered to cooperate with Staff in its investigation, and provide documents and witnesses as requested, during the pendency of this action.

5. The Staff shall continue to investigate the operations of Respondents. A full hearing on the allegations set forth in this OII, Staff's Declarations, and on any additional information which staff or respondents wish to advance that is material to the issues in the proceeding, shall be held on a date to be set at the Commission's hearing room, 505 Van Ness Avenue, San Francisco. The cutoff date for advancing evidence of additional violations, and for the exchange of testimony, shall be determined by the Assigned Commissioner or Assigned Administrative Law Judge.

6. Staff shall be subject only to discovery relating to the specific violations alleged in this order, or those added by subsequent motion.

7. Staff shall monitor consumer complaints made against Respondents. We expect Staff to bring additional evidence, if any, of any alleged harmful business practices by Respondents to our attention (e.g. new types of violations). Staff may propose to amend the OII to add additional affiliated respondents. Any such proposal shall be presented to the Assigned Commissioner or Assigned Administrative Law Judge in the form of a motion to amend the OII and shall be accompanied by a Staff declaration supporting the proposed amendments.

8. These ordering paragraphs suffice for the "preliminary scoping memo" required by Rule 6 (c) of the Commission's Rules of Practice and Procedure. This proceeding is categorized as an adjudicatory proceeding and will be set for evidentiary hearing. The issues of this proceeding are framed in the above order. A prehearing conference shall be scheduled for the purpose of setting a schedule for this proceeding including dates for the exchange of additional written testimony, determining which of the Staff's witnesses will need to testify, and addressing discovery issues. This order, as

to categorization of this proceeding, can be appealed under the procedures in Rule 6.4. Any person filing a response to this order instituting investigation shall state in the response any objections to the order regarding the need for hearings, issues to be considered, or proposed schedule. However, objections must be confined to jurisdictional issues that could nullify any eventual Commission decision on the merits of the alleged violations, and not consist of factual assertions that are more properly the subject of evidentiary hearings.

9. Service of this order on Respondents will be effectuated by personally serving a copy of the order and Staff's declarations on the respondents' designated agent for service in California:

Pacific Bell Wireless, LLC (U-3060, 4314) Registered Agents in California:

Corporation Service Company
2730 Gateway Oaks Drive, Suite 100
Sacramento, CA 95833

Pacific Bell Mobile Services (U-4135) Registered Agent in California:

Samuel Novell
2150 Webster Street, Rm. 735A
Oakland, CA 94612

10. Staff's investigative Report contains Cingular's responses to Staff data requests, that Cingular has identified as confidential and/or proprietary pursuant to Public Utility Code section 583. The Commission finds that none of the information contained in the report is so trade sensitive as to outweigh the public interest in disclosure, and such disclosure is hereby authorized.

11. A copy of this order and Staff declarations will also be sent by certified mail directly to the PBW, Cingular, and Pacific Bell Mobile Services governmental affairs' addresses on record with the Commission.

This order is effective today.

Dated: June 6, 2002, in San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners

I will file a written concurrence.

/s/ HENRY M. DUQUE
Commissioner

Commissioner Henry M. Duque concurring:

It is with serious reservations that I vote to open an investigation into the operations of Cingular Wireless. It is not that I believe the complaints are without merit or that Cingular is providing stellar service. To the contrary, Cingular's service can not be stellar in all places and at all times; but nor can any of Cingular's competitors'. In fact, as anyone that uses a wireless telephone would attest, the whole wireless industry suffers from a want of seamless coverage. So the foundation for singling out Cingular on allegations of poor service coverage or on that basis misleading advertisement is too thin and arbitrary.

The concerns of the Commission on coverage and its response to a large number of complaints are well intentioned. However, for wireless telephone consumers in general, the more responsive action is for this Commission to clearly delineate its authority on wireless service and establish industry-wide service quality standards, if warranted, and practical consumer protection rules for practices that market rivalry is not able to fix.

First, although the customer complaints against Cingular may have merit, there is comparable number of complaints about the services of other wireless companies.

Second, the alleged problems – gaps in service coverage - do exist, but they are not unique to Cingular. Coverage problems exist and are endemic to the industry. My understanding is that to resolve service gap problems companies have to invest more in their network. Does the commission want to engage in dictating capital expenditures in an industry largely seen as fiercely competitive. I am not convinced that an industry-wide problem could be resolved by singling out and focusing on one provider, no matter what example this will send to the industry.

The Commission's Consumers Services Division has gathered a seemingly high number of complaints that comprise of, among other things, billing disputes, contract disputes, and coverage complaint, many of which will have been resolved by the time this investigation is issued. These complaints are worrisome, but not especially unusual given the development of wireless service, its needs for capital investment, and the state of competition.

It is common knowledge to any wireless telephone user that wireless service providers including Cingular, do not provide a seamless coverage in all areas. That is evident in the disclaimer nearly every wireless provider writes in typically small scripts at the bottom of their advertisements. By any measure, Cingular's customers are not the only wireless telephone users frustrated by lack of coverage or call drop-off to one extent or another. Perhaps this case will help to highlight the general mood of customers' frustrations and help to send a signal to the

industry. Still, I am concerned about the focus on one company when the problem is widespread. If the service conditions of Cingular warrant an action necessary for one provider, then similar conditions elsewhere would warrant an investigation of all other wireless service providers.

/s/HENRY M. DUQUE

Henry M. Duque
Commissioner

June 6, 2002
San Francisco, California